IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-954

RAY A. HARRON, *Petitioner*,

v.

UNITED HOSPITAL CENTER, INC., *et al.*, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondents, United Hospital Center, Inc., and its officers and directors (hereinafter "UHC" or "the hospital"), oppose the petition for a writ of certiorari filed herein by Ray A. Harron. That petition asks this Court to consider a common and entirely reasonable hospital practice, and is unworthy of the Court's consideration. The petition should be denied.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit from which review is sought is reported at 522 F.2d 1133.

QUESTION PRESENTED

Is a contract between a hospital and a radiologist, pursuant to which the radiologist is granted control over the use of the hospital's radiology equipment in exchange for a commitment to provide the radiology services required by the hospital, subject to the Sherman Act, and, if it somehow is, does it violate that Act?

STATEMENT OF THE CASE

Because Petitioner's Statement of the Case omits most of the relevant facts, the hospital's Statement necessarily will be longer than would normally be required. The following facts are drawn from the depositions taken in this matter and from the findings of the District Court and the Court of Appeals.

Essentially, the suit brought by Petitioner, Dr. Harron, challenges the right of a hospital to determine how its own radiology department will be administered and its right to select what radiologist (and how many) it will contract with to ensure that the radiology department meets the needs of the hospital and its patients.

From the beginning of relevant time, there were two hospitals in Clarksburg, West Virginia – St. Mary's, operated by an Order of the Roman Catholic Church, and Union Protestant, operated by the Methodist Church. Dr. John D.H. Wilson was the radiologist at St. Mary's; Dr. Harron was the radiologist at Union Protestant.

Practically all hospitals in this country fulfill their responsibility to provide certain medical services – traditionally, radiology, pathology and anesthesiology and increasingly other specialties such as nuclear medicine and cardiac catheteriza-

tion – by contracting with one doctor to be in charge of the department and to be responsible for providing the services required by the hospital (with the assistance of whatever number of associated physicians under his supervision may be necessary). Such arrangements have been upheld by the courts, both state and Federal, each and every time they have been challenged (often on grounds similar to those asserted by Petitioner here).[1]

These cases, and the expert testimony in this case (in deposition) establish that such an "exclusive" contract is the best method of providing radiology services. It is necessary to ensure accountability, to ensure that services are performed 24 hours a day, seven days a week, and to integrate the radiology services into the complex scheduling of a hospital.

Dr. Harron was the exclusive radiologist at Union Protestant. Dr. Wilson was the exclusive radiologist at St. Mary's. Each used the radiology equipment at the other physician's hospital only occasionally and only with the permission of the other.[2]

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[1] See *Adler v. Montefiore Hospital Association of Western Pennsylvania*, 453 Pa. 60, 311 A.2d 634 (1973), *cert. denied*, 414 U.S. 1131 (1974); *Benell v. City of Virginia*, 258 Minn. 559, 104 N.W.2d 633 (1960); *Blank v. Palo Alto-Stanford Hospital Center*, 234 Cal.App.2d 377, 44 Cal. Rptr. 572 (Ct. App. 1965); *Letsch v. Northern San Diego County Hospital District*, 246 Cal.App.2d 673, 55 Cal. Rptr. 118 (Ct. App. 1966); *Rush v. City of St. Petersburg*, 205 So.2d 11 (Fla. 1967); *Dell v. St. Joseph Mercy Hospital of Detroit* (E.D. Mich., Civil No. 4-70668, May 9, 1974), *aff'd on other grounds without published opinion*, 511 F.2d 1403 (6th Cir. February 20, 1975); *Dattilo v. Tucson General Hospital*, 23 Ariz. App. 392, 533 P.2d 700 (1975).

[2] Dr. Harron's exclusive arrangement derived from his contract with Union Protestant, which enabled him to determine, as is customary, who would use the hospital's radiology equipment. Dr. Wilson's exclusive arrangement resulted from the fact that he owned the radiology equipment at St. Mary's.

After long and complex negotiations, the two hospital merged in the summer of 1970 in order to pool their resources, avoid duplication, and thus provide a higher quality of hospital care than either could supply alone. Specifically the merged hospital (Respondent, United Hospital Center) determined to construct a new hospital. Planning of the new facility began at the same time that the merger was effected. Construction will be completed by the end of 1976.

Since the hospitals had merged into one institution and were planning for the time when there would be one physical plant, the duplicate departments of the two predecessor hospitals had to be merged. By January 1, 1972, all departments had successfully been merged with one exception – the two radiology departments. The two radiologists (Dr. Harron and Dr. Wilson) were unable to agree on a method for combining into one entity with which UHC could contract for the operation of its radiology department.

Because Dr. Wilson and Dr. Harron had been unable to form a joint entity (although it was their stated intention to do so), the two radiology departments operated after the merger as they had before. Dr. Harron practiced as the exclusive radiologist at Union Protestant under successive six-month extensions of his contract which were granted to provide time to work out arrangements with Dr. Wilson and with UHC. The extensions of Dr. Harron's contract expired on December 31, 1971. Dr. Wilson continued as the exclusive radiologist at St. Mary's.

The operation of two separate radiology departments violated the purpose and the spirit of the merger of the two hospitals into UHC. In order to place the two radiology departments under single administrative control and

to provide for continuing radiology services in the absence of an agreement, the hospital decided to implement, effective January 1, 1972, a different arrangement as an interim measure until Dr. Harron and Dr. Wilson could form a single entity which UHC could negotiate a contract.

The hospital determined that its radiology department would not be operated under contract with either Dr. Harron or Dr. Wilson, but that instead each radiologist could use the radiology facilities at each plant.[3] The hospital provided that each member of the medical staff could designate which of the two radiologists he preferred. To provide for administration of the merged radiology department, Dr. Wilson was named administrative head of the department without, however, control over the professional activities of Dr. Harron.

The hospital quickly learned that this arrangement would not work. The same circumstances which had prevented the two radiologists from agreeing to form a merged entity and had led to the hospital's formulation of this interim measure prevented it from working. A severe personality clash between Dr. Wilson and Dr. Harron combined with the new arrangement to adversely affect patient care in a number of ways:

—The two radiologists engaged in an unseemly competition for patients, and accusations were made against both doctors that each had appropriated radiology cases intended for the other.

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[3] Effective January 1, 1972, the hospital purchased the radiology equipment owned by Dr. Wilson at the St. Mary's plant and from that date all the radiology equipment at the two plants was owned by UHC.

–Radiology technicians were caught between the two radiologists and were unable to comply with two different sets of directions for performing a particular radiology procedure.

–There was no coordination between the radiologists. In one instance a patient of Dr. Harron's was kept under anesthesia an unnecessary additional 30-45 minutes because the technician Dr. Harron needed to perform a radiology procedure was caring for a patient of Dr. Wilson's.

–Upon other occasions, one radiologist would be using equipment that the other needed.

–Scheduling in the hospital was adversely affected, confusing in particular the dietary and nursing departments, who were unable properly to coordinate patient care and feeding with radiology treatments.

–Staff morale was affected, particularly since physicians were forced to take sides between the two competing radiologists.

–The two radiologists could not agree on what radiology facilities they would recommend to the hospital for inclusion in the new building.

Four different outside experts came to Clarksburg to help solve the problem. They immediately recognized the harmful effects the experimental arrangement was having on the patients and the medical staff, and each recommended that the two radiologists form a merged entity with which the hospital could contract. The hospital continued its efforts to bring the two radiologists together, but the merged entity still was not formed.

Members of the medical staff of the hospital complained to the Board of Directors that there was a "serious

problem" "affecting patient care" and that a solution was urgently required. As the President of the Board stressed in deposition, "I can't state it more forcefully than that Radiology was a problem all the time."

At a meeting of the medical staff the physicians voted by a substantial margin to recommend to the hospital board that if it decided to enter into an exclusive contract for the operation of the radiology department, it do so with Dr. Wilson. Dr. Harron stated at this meeting that if the board did determine to enter into an exclusive contract, he "wouldn't want it."

Subsequently the Board decided to enter into an exclusive contract with Dr. Wilson and such a contract, dated October 16, 1973, was executed, effective November 1, 1973. This contract provides that Dr. Wilson is solely responsible for the provision of radiology services required by the hospital, and it preserves the right of any other member of the medical staff to read X-rays and provide consultative services upon request. Dr. Harron continues as a member of the hospital's medical staff and as such may make readings of any films taken in the hospital by the radiology department (if requested by a patient's attending physician), but he may not use the hospital's X-ray equipment without permission. In effect UHC reinstituted the system that had been in effect at both its predecessor hospitals – a contract with one radiologist for the operation of the radiology department, with other radiologists on the medical staff permitted to consult but not to use the hospital's X-ray equipment without the permission of the hospital's radiologist.

The medical staff has informed the hospital that after the exclusive contract with Dr. Wilson went into effect the problems in the radiology department were resolved and that the department has functioned well.

Dr. Harron continues to practice his profession. When he was the radiologist at United Protestant and later when he was one of the radiologists at UHC, Dr. Harron practiced in a number of other institutions in the area around Clarksburg. At the time his deposition was taken (January 1974), he was performing radiology services at three – and perhaps six – institutions around Clarksburg.[4]

Dr. Harron instituted the instant action on November 15, 1973. He moved for a temporary restraining order (which was denied) and for a preliminary injunction to require the hospital to abrogate its contract with Dr. Wilson and return to the prior unworkable arrangement whereby both radiologists were responsible for radiology services. Extensive discovery ensued. On November 6, 1974 the District Court granted Dr. Harron's motion for a preliminary injunction, and required the hospital to reinstitute what the District Court itself found was an "unsatisfactory" arrangement. (Pet. App. C, 3) It did so on the ground that the hospital was required to hold a due process hearing before entering into the contract with Dr. Wilson. The District Court did not consider the asserted antitrust violations. The preliminary injunction was stayed pending appeal.

On appeal the hospital argued that the preliminary injunction should be dissolved. It urged, *inter alia*, that Dr. Harron was not likely to prevail on the merits. Although the appeal was brought from the preliminary injunction, Dr. Harron urged the Court of Appeals to rule on the merits. As he said in his brief:

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[4] A contract Dr. Harron made with an associate radiologist on September 9, 1973, reveals that he had contracts to provide radiology services in six named institutions, but Dr. Harron refused to answer questions about three of them.

> "As for the ultimate likelihood of success in this case, there are no additional facts for the Trial Court to determine. This court [the Court of Appeals] is called upon here to issue a ruling on the merits, even though the case is technically at the stage of an application for a preliminary injunction."

The Court of Appeals accommodated Dr. Harron, and ruled on the merits. It held that no hearing was required, that the alleged acts did not violate the Sherman Act, and that therefore there was no Federal jurisdiction. In the words of the Court:

> "It is frivolous to urge that the employment of a single doctor to operate the radiology department of a hospital invokes the Sherman Act and the civil rights statutes pleaded." (Pet. App. B, 6)

The Court of Appeals directed the District Court to dismiss the complaint for lack of Federal jurisdiction. The District court did so on October 22, 1975. Petitioner's petition for a writ of certiorari followed.

REASONS THE WRIT SHOULD NOT BE GRANTED

In his petition to this Court Dr. Harron urges that certiorari be granted on one question – the dismissal of the counts of the complaint alleging violations of the Sherman Act. Dr. Harron does not ask this Court to review the determination of the court below that no hearing was required. Even as thus limited, however, Dr. Harron's petition should be denied.

I. THE SHERMAN ACT QUESTIONS WERE NOT ARGUED BY PETITIONER AND WERE NOT CONSIDERED IN DEPTH BY THE COURTS BELOW.

The first and most obvious reason why this Court should not grant the writ is that it would not have the benefit of any analysis of the antitrust question by the courts below. The gravamen of Dr. Harron's complaint is that he was entitled to a due process hearing, and his tactical judgment below was to concentrate exclusively on that issue. He submitted no brief to the District Court on the Sherman Act questions, and the District Court did not consider this issue. Dr. Harron's brief to the Court of Appeals did not mention the Sherman Act questions. Although he sought that Court's decision on the merits, he was content to rely on his allegation that he was entitled to a hearing. The Court of Appeals, in directing dismissal of the complaint, necessarily determined that no violation of the Sherman Act was made out by the complaint, but it did so with a minimum of discussion since the matter had not been raised by Dr. Harron.

This case, therefore, comes to this Court without any refinement by the lower courts of the issue presented by Petitioner.

II. THIS CASE DOES NOT PRESENT THE SAME ISSUE AS *HOSPITAL BUILDING COMPANY* DOES.

Petitioner premises his request for the writ upon the assertion that the question presented by the instant case is the same as that which is presented in *Hospital Building Company v. Trustees of the Rex Hospital* (No. 74-1452, *cert. granted* October 6, 1975), and that this Court should grant the writ in order to consider this case with or in

light of *Hospital Building Company*. But this suggestion is erroneous: the Sherman Act issues before this Court in *Hospital Building Company* are not in fact present in the instant case.

The basic issue in *Hospital Building Company* is whether the conspiracy there alleged was in interstate commerce or had a sufficient effect on interstate commerce to bring it within the jurisdictional purview of the Sherman Act. A fair reading of the opinion below, however, indicates that the Court of Appeals did not base its decision on the jurisdictional grounds at issue in *Hospital Building Company*. The opinion below holds that "It is frivolous to urge that the employment of a single doctor to operate the radiology department of a hospital invokes the Sherman Act . . . ." The court below, thus, apparently determined that even *if* interstate commerce were affected by the actions complained of, they did not violate the substantive terms of the Sherman Act.

III. THE DECISION BY THE COURT BELOW THAT THE HOSPITAL'S CONTRACT FOR OPERATION OF ITS RADIOLOGY DEPARTMENT DOES NOT VIOLATE THE SHERMAN ACT IS CORRECT.

The jurisdictional issue which Petitioner seeks to bring to this Court is in any event irrelevant. For the Court of Appeals was correct in determining that even if the agreement between the hospital and Dr. Wilson came within the jurisdictional purview of the Sherman Act, it does not violate that Act.

An agreement between a hospital and a physician to operate the hospital's radiology department is not in restraint of trade, nor does it in any way represent an attempt at monopolization. The Sherman Act does not prohibit a firm from contracting with one person to use its

equipment or to provide services for it. Certainly a business is permitted to enter into a contract with one supplier or with one law firm. The need for a hospital to have such an arrangement for provision of its radiology services is even greater. Accordingly, it is an almost universal hospital practice.

It should be recalled that other physicians were free to compete for the contract, and Dr. Harron does not allege that he was precluded from that competition. Moreover, the hospital's contract with Dr. Wilson does not preclude Dr. Harron or other radiologists from competing for radiology "business" in the Clarksburg area. While the contract provides that other radiologists cannot use UHC's equipment, that is certainly a normal function of UHC's ownership, and it does not in any way affect their ability to enter into contracts with other institutions in the area to operate their radiology departments, or to set up their own radiology clinics. As mentioned above, Dr. Harron was serving as the radiologist in at least at three other places.[5]

Finally, even if the contract were somehow deemed to be a restraint of trade, it would be an entirely reasonable one. It is established by common practice and the deposition testimony in this case that such an exclusive arrange-

[5] Dr. Harron apparently does not allege any restrictions on his ability to practice in institutions other than UHC. Paragraphs 33 and 36 of his Complaint, both of which make general and conclusory allegations that UHC conspired to control all radiology work in Harrison County, are based on the contract between Dr. Wilson and the hospital. The contract, however, relates only to the hospital's Radiology Department and does not in any way restrict Dr. Harron's ability to practice elsewhere. As mentioned, Dr. Harron is in fact serving at least three and probably six other institutions in the area of Clarksburg.

ment is necessary for the hospital to discharge its responsibilities. The reasonableness of such an arrangement is all the more evident in the particular circumstances of this case: the hospital had experimented with another arrangement and that arrangement had proved to be clearly harmful.

IV. EVEN IF THE OPINION OF THE COURT BELOW WERE CONSTRUED TO BE BASED ON JURISDICTIONAL GROUNDS, THIS CASE WOULD BE ENTIRELY DIFFERENT FROM *HOSPITAL BUILDING COMPANY*

Even if the opinion of the court below were read, as Petitioner urges, as holding that the jurisdictional prerequisites of the Sherman Act had not been satisfied, it would not present the same issues as *Hospital Building Company*.

The circumstances present in the instant case are entirely different from those in *Hospital Building Company*. The latter case involves an alleged conspiracy to prevent an interstate owner and manager of hospitals from trebling the capacity of one of its hospitals. Here, however, the gravamen of Dr. Harron's allegations is merely that a hospital's decision to operate its radiology department by contracting with one radiologist instead of two radiologists somehow violates the Sherman Act.

The manner in which one local hospital's radiology department is operated has no effect on interstate commerce – and certainly it is entirely different in both kind and degree from a conspiracy that would prevent an interstate entrepreneur from trebling the capacity of one of its hospitals. There may be a question whether an entire hospital is in interstate commerce. But the activities of just one of a hospital's many departments

cannot affect interstate commerce except to the most minimal degree.[6] Furthermore, whatever purported connection UHC's radiology department may have with interstate commerce, it is important to note that the hospital's contract with Dr. Wilson will not have any effect on it. The agreement complained of does not relate to matters of interstate commerce. Petitioner in *Hospital Building Company* argues on the basis of *Goldfarb* that "a purely local conspiracy can substantially affect interstate commerce if the activities restrained are an integral part of interstate transactions."[7] But the contract here does not restrain any activities that are part of interstate commerce. The volume of radiology work at United Hospital Center is the same whether Dr. Wilson is solely responsible for operating the hospital's radiology department or whether Dr. Harron joins in the operation of the department.[8] Even though the Radiology Department may have out-of-state suppliers, interstate commerce is not affected by the agreement.

In his Petition, Dr. Harron seeks to construct an elaborate chain of causation by which the contract between Dr. Wilson and UHC might have an effect on interstate commerce. He suggests that Dr. Wilson will be able to set

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[6] As stated in Defendants' Answer herein, a study of UHC admissions in 1973 showed that only ½ of 1% of its admissions listed out-of-state addresses. In *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), this Court found the requisite nexus with interstate commerce in the fact that "the transactions which create the need for the particular legal services in question frequently are interstate transactions." 421 U.S. at 783. Very few of the "transactions" which create the need for radiological services at UHC are the result of admitting out-of-state patients.

[7] Petitioner's Brief, p. 17

[8] Dr. Wilson handles the work that Dr. Harron and his group would have performed by securing addititional associate radiologists of his own.

his own rates, that other radiologists in West Virginia will follow suit, and that ultimately radiologists over the entire country will raise their rates accordingly. This fanciful exercise is so patently far-fetched that it requires no response.

CONCLUSION

Petitioner asserts that this court should grant the writ to consider whether a hospital's contract with a radiologist violates the Sherman Act. But this issue has not been considered in any depth by the court below. Further, it is clear that such a contract neither falls within the jurisdictional scope of the Sherman Act nor violates that Act. And this case does not involve the issue which is presented by *Hospital Building Company*. This case does not warrant this Court's consideration, and the petition should be denied.

Respectfully submitted,

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